No. S281977

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

LEGISLATURE OF THE STATE OF CALIFORNIA; GAVIN NEWSOM, in his official capacity as Governor of the State of California; and JOHN BURTON, Petitioners,

v.

SHIRLEY N. WEBER, Ph.D., in her official capacity as Secretary of State of the State of California,
Respondent,

THOMAS W. HILTACHK,
Real Party in Interest.

APPLICATION OF CALIFORNIA CONSTITUTIONAL LAW RESEARCHER FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER; [PROPOSED] AMICUS CURIAE BRIEF

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES: **Page(s)**

CASES

TABLE OF AUTHORITIES: (Continued) **Page(s)**

STATUTES

OTHER AUTHORITIES

CALIFORNIA CONSTITUTION

TABLE OF AUTHORITIES: (Continued) **Page(s)**

CALIFORNIA CONSTITUTION (ADOPTED 1849)

CALIFORNIA CONSTITUTION (ADOPTED 1879)

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to the California Rules of Court, rule 8.520(f), the undersigned California constitutional law researcher requests leave to file the attached brief amicus curiae in support of Petitioners in the above-captioned case.

INTEREST OF THE AMICUS

Amicus is a California constitutional law researcher and serves as Executive Director of the Independent California Institute, a California non-profit think tank dedicated to improving self-government for Californians. Amicus is also the Vice Chair of the Sweatfree Procurement Advisory Group, which advises the City and County of San Francisco on its distinctive contracting rules relating to sweatshop labor.

Separate from their role on the Advisory Group, they assisted the City and amici in the case *Lacy v. City of San Francisco*, No. A165899 (Cal. Ct. App. Aug. 8, 2023) (*Lacy*). By researching past versions of the California Constitution, they discovered the "no alien eligible to citizenship" clause (*Id.* at pp. 12-13) key to undermining the Respondents' textualist argument.

Amicus also performed constitutional research and served as primary co-drafter for two statewide initiatives, 17-0005: CALIFORNIA AUTONOMY FROM FEDERAL GOVERNMENT and 17-0019: ESTABLISHES A FUND FOR HEALTHCARE IN CALIFORNIA EXEMPT FROM REVENUE RESTRICTIONS.

Amicus, through their research, has accumulated extensive knowledge of California's fundamental government framework, particularly with regards to the distinction between revision and amendment. They

submit this brief to provide the Court with important case law and arguments which so far have not been fully expounded in this case.

REASON WHY THE APPLICATION SHOULD BE GRANTED

As a transgender and non-binary person, Amicus is, unfortunately, viscerally aware of current threats to democracy and the rule of law in California, both in the form of authoritarian impulses nationwide, and, at the state level, from proposed initiatives that would discard fundamental precepts of California government in favor of a particular policy goal or ideology.

Amicus, in their own capacity and as a student of California's democracy, has three primary concerns with the way this the Taxpayer Protection and Government Accountability Act ("the Measure") pursues its goal—reducing taxes—with such disregard to fundamental aspects of California's government framework.

First, the Measure not only revises the Constitution but does so in such a messy and ambiguous fashion that it would leave "lingering uncertainty in the law" with respect to California's fundamental framework—an urgent enough problem for the courts to justify a pre-ballot challenge. (*Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158, 170.) In effect, several major aspects of the rule of law in California would be left in suspense until the courts were able to resolve cases respecting the Measure's various sweeping changes.

Second, because the Measure makes the threshold for raising state taxes (in the broadest sense) identical with the threshold for revising the Constitution (see Petitioners' traverse at p. 33), it vastly increases the

incentive for the Legislature to address present and future fiscal crises not with tax changes but with an "improvident or hasty… revision" (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 347 (*McFadden*)), breaching the "bulwark" (*Ibid.*) between constitutional amendment and revision.

Finally, as a San Francisco city official and voter, Amicus would be personally affected by how the Measure hamstrings charter cities' authority over their municipal affairs, particularly "conduct of city elections." (Cal. Const. Art. XI § 5 subd. (b)(3).) Amicus reasonably expects that their votes on future voter-initiated city ballot measures should have the same weight as other voters', and that it is not the purview of the statewide electorate to decide otherwise (except by revising the Constitution).

No party or counsel for a party has authored any part of this brief, nor has any person or entity made a monetary contribution intended to fund the preparation or submission of the brief.

Dated: January 28, 2024 Respectfully submitted,

Coyote Codornices Marin

[PROPOSED] BRIEF AMICUS CURIAE

INTRODUCTION

Since 1911, California has had the direct initiative, which allows one or a few people to draft a constitutional amendment without public hearings or recorded legislative history. How is it that our Constitution has not been swamped by vague, contradictory, poorly drafted, deceptive, or self-interested provisions? How is it that, after more than 110 years of direct democracy, the rule of law still stands in California?

The answer lies with two essential roles performed by California's courts. First, the courts are obligated to harmonize conflicting constitutional provisions, giving effect to each. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 218 (*Bighorn*).) If a poorly drafted initiative constitutional amendment adds vague or contradictory language to our Constitution, the courts must repair this damage to the rule of law by clarifying the meaning of the new provisions and their relationship with the rest of the Constitution (*Nogues v. Douglas* (1857) 7 Cal. 65, 70 (*Nogues*)):

> The Constitution is itself a law, and must be construed by some one. Each department must be kept within its appropriate sphere. There must, then, from the very nature of the case, be a power lodged somewhere in the government to construe the Constitution in the last resort. The different departments cannot be each left the sole and conclusive judge of its own powers. If such was the case, these departments must always contest and always be in conflict; and this cannot be the case in a constitutional government, practically administered.

Second, the courts ensure that initiative constitutional amendments be "changes specific and limited in nature"—that is, amendments, not revisions. (*Strauss v. Horton* (2009) 46 Cal.4th 364, 425.)

The single-subject rule, adopted in 1948, furthers this goal by functioning as a "substantive limitation on the scope of initiatives." (*Schmitz v. Younger* (1978) 21 Cal.3d 90, 98.) It also prevents drafters from subverting the will of the voters by including unrelated provisions which are important to the drafters' interests but not to the voters. (*Ibid.*)

Limiting the scope of ballot initiatives limits the damage poorly or deceptively drafted initiative constitutional amendments can wreak on the rule of law. The power to draft constitutional *revisions* is wisely reserved to constitutional conventions and the legislature, both of which are obligated to record their legislative history and to consider, before the public, the systemic effects of their proposed changes on California's governmental framework.

As an extreme example, if an attempted initiative constitutional revision like the one considered in *McFadden* were allowed to come into effect, both the meaning of its numerous new provisions *and* their relationship with existing Constitutional provisions would be a series of open questions, leaving a yawning chasm in our understanding of California's governmental framework that might not be closed for years to come.

However, even specific limits to the courts' ability to interpret the law, such as the provision struck down by this Court in *Raven v. Deukmejian* (1990) 52 Cal.3d 336 (*Raven*), can constitute such an insult to California's government framework as to be declared impermissible revisions. The courts have wisely been wary of initiative "amendments" that interfere with their ability to interpret the law: *only the courts* can ensure that the various provisions of our Constitution have clear meanings and operate in harmony with each other. ("The judiciary, from the very nature of its powers and means given it by the Constitution, must possess the right to construe the

Constitution in the last resort…" *Raven, supra,* (1990) 52 Cal.3d 336, 355, quoting *Nogues*, *supra* (1858) 7 Cal. 65, 70.)

Unlike the initiative in *Raven*, the Measure before this Court does not have a single offending provision that could be severed from the others. Rather, the Measure consistently pursues a single policy goal (reducing taxes) so relentlessly and with such disregard for California's government framework that it makes a hash of it: scrambling the relationship between the executive and legislative branches and their future selves, nullifying future valid decisions by the judiciary, putting the scope of the referendum power into question, and gutting home rule for charter cities. Finally, the *only* section of the Measure that makes apparently valid constitutional changes is so different in kind from the others that it violates the single-subject rule.

ARGUMENT

I. THE MEASURE IS INVALID BECAUSE IT WOULD REVISE THE CONSTITUTION

A. The Measure Lets the Executive and Legislative Branches Bind the Hands of Future Executive and Legislative Branches

Petitioners argue correctly that the Measure would impermissibly revoke core legislative and executive branch powers (Petition, p. 41-58). But there is another, even more fundamental way the Measure revises the relationship between the branches of state government.

It is a long-standing general rule in California that the Legislature cannot limit or restrict its own power or that of subsequent

Legislatures and that the act of one Legislature does not bind its successors. (*In re Collie* (1952) 38 Cal.2d 396, 398 (*Collie*), citing cases as old as *Thompson v. Board of Trustees* (1904) 144 Cal. 281, 283.)

This Court found the underlying principle to be so basic that it ought to apply to the Governor as well, without further exposition. (*Collie*, *supra*, 38 Cal.2d 396, 398.) Because "supreme executive power" is vested in the Governor. (Cal. Const. Art. V § 1), executive branch staff may not bind future executive branches either, as doing so would usurp the Governor's role as chief executive.

Recently, a Court of Appeal went so far as to call the rule against binding successors' hands "axiomatic" for government in general (*Tiburon Open Space Committee v. County of Marin* (2022) 78 Cal.App.5th 700, 709 (*Tiburon*)):

> It is axiomatic that governmental powers are indefeasible and inalienable. They cannot be surrendered, suspended, contracted away, waived, or otherwise divested. In short, government cannot bind itself not to govern by exercising its rightful powers, nor can it bind the hands of its successors.

The rule against binding successors' hands ensures that the voters can know which elected officials to hold accountable (Cal. Const. Art. II § 1: "all political power is inherent in the people") by preventing power from being permanently divested from one branch of government to another or divested beyond the reach of government entirely.

Voters, through the initiative system, *may* bind the Legislature. (*Rossi v. Brown* (1995) 9 Cal.4th 688, 715-716 (*Rossi*).) However, branches of state government *may not* unilaterally divest their power to the voters. While it may seem like the Legislature has the power to do so by placing a

constitutional amendment on the ballot, ultimately, the voters decide whether to adopt that amendment or to leave government power where it lies. Like Ulysses, the Legislature cannot literally tie its own hands to the mast—it can only ask others to do so.

Finally, it almost goes without saying that the executive branch may not bind future Legislatures: "It is fundamental that an administrative agency may not usurp the legislative function, no matter how altruistic its motives are." (*City of San Joaquin v. State Bd. of Equalization* (1970) 9 Cal.App.3d 365, 374.)

If the Measure became law, it would so transform California's governmental framework that neither the rule against binding successors' hands nor the principle it stems from, that government may not divest its own power, would still stand. Under the Measure, the Legislature could bind future Legislatures, the executive branch could bind future executive branches, and the executive branch could bind future Legislatures.

The Measure accomplishes this strange feat through two related provisions. First, it creates a "ratchet effect" by stating that tax increases (broadly defined) may only be accomplished with voter approval, while leaving state government power to *decrease* taxes fully intact. (Measure, Section 4, proposed Art. XIII A § 3, subd. (b).):

> Any change in state law which results in any taxpayer paying a new or higher tax must be imposed by an act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, and submitted to the electorate and approved by a majority vote.

Second, the Measure defines "state law" (which would replace "state statute" in our current Constitution) as an agglomeration of the powers

of various branches of government. (Measure, Section 4, proposed Art. XIII A § 3, subd. (h)(4).):

> "State law" includes, but is not limited to any state statute, state regulation, state executive order, state resolution, state ruling, state opinion letter, or other legal authority or interpretation adopted, enacted, enforced, issued, or implemented by the legislative or executive branches of state government.

Under the Measure, *any government actor* which changed "state law" in a way that reduced the scope or rate of taxes would bind both the Legislature and the executive branch against reversing that decision.

The Legislature could bind future Legislatures. State law (in the ordinary sense) provides for a 1% tax on lumber and engineered wood products. (Public Resources Code § 4629.5.) Suppose the Measure were in effect. If the legislature wished to reduce the lumber tax rate to 0.5%, they could still do so, by majority vote.

However, now suppose that a future legislative session wished to undo its predecessors' change by raising the tax rate back to 1%. Under the Measure, it could not. That would be a "state statute… enacted by… the [Legislature]" that would result in "any taxpayer paying… a higher tax." (Measure, Section 4, proposed Art. XIII A § 3, subds. (b) and (h)(4).) The future Legislature could put the proposed tax increase before the voters, but it could not *itself* reverse the past Legislature's decision.

Under the Measure, when the Legislature reduced the tax rate to 0.5%, it was not, as under our current government framework, merely changing a statute; it was binding future Legislatures *never* to increase that

tax rate above 0.5%, until such time as the voters chose to raise the ceiling the Legislature had imposed.

One might attempt to argue, referring to *Rossi, supra* that the *voters* were binding the future Legislature session through their adoption of the Measure. But the voters did not reduce the tax rate to 0.5% in this example; the *Legislature* did! The Measure, while purporting to put voters in control of taxes, would do the opposite, allowing the Legislature to make an irrevocable change to tax law without the voters' permission.

Another weak counterargument is that under current law, the Legislature can already, politically speaking, bind the hands of future Legislatures because the Legislature can reduce taxes by majority vote but needs a two-thirds vote to raise them. However, the power stays vested within the Legislature. There is ample precedent for the Legislature to operate under a two-thirds supermajority in some cases (e.g., enacting urgency statutes or overriding a Gubernatorial veto). There is doubtless some *higher* vote threshold that *would* bind future Legislatures; for example, a Court of Appeals, in a case pending before this Court, called a seven-eighths supermajority requirement "virtually insurmountable." (*Castellanos v. State* (2023) 89 Cal.App.5th 131, 168.)[1] But subjecting future Legislatures to a two-thirds threshold plainly does not constitute binding.

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[1] Frustratingly, the Court of Appeal considers at length when it is permissible for the Legislature to be bound by the voters but does not consider if the Legislature would be binding its successors if, by some alignment of the political stars, it were briefly able to meet the seven-eighths supermajority threshold.

The executive branch could bind future executive branches. Suppose the Franchise Tax Board (FTB), an executive agency, were to write regulations on some complex topic, such as whether a person is considered resident in the state of California for the purpose of paying income taxes.[2]

Now, suppose, sometime later, the FTB realized that their previous regulations were incomplete, and wished to update them, highlighting another class of taxpayer that should *also* be considered resident in California, under different rules.

Under the Measure, the FTB could not. The Measure defines both the first and second set of regulations as part of "state law." (Measure, Section 4, proposed Art. XIII A § 3, subd. (h)(4): "state regulation… state opinion letter, or other legal authority or interpretation… issued… by the executive branch…") The second set of regulations would impermissibly result in "any taxpayer paying a new… tax" which could only be accomplished with voter approval. (Measure, Section 4, proposed Art. XIII A § 3, subd. (b).)

By issuing the first set of regulations, the Franchise Tax Board would bind future Franchise Tax Boards to *never again* issue regulations that asserted that a class of person not named in those regulations could be considered resident for the purpose of California income taxes, until voters changed the underlying statutes.

This is not to suggest that executive branch agencies could make interpretations that clearly diverged from the controlling statutes; if they did, the courts could still intervene. However, courts are also required to defer to

[2] Assume that all the hypothetical changes in regulatory guidance in this section were issued in accordance with the proper procedures and could be considered at least *plausible* interpretations of state statues.

executive branch interpretations: "administrative interpretation of a statute will be accorded great respect by the courts and will be followed if not clearly erroneous." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 (*Yamaha*), quoting *Bodinson Mfg. Co. v. California Employment Commission* (1941) 17 Cal.2d 321, 325-326.) Courts are also meant to recognize that there is a "continuum" of deference, where "quasi-legislative" actions, like the regulations in this example, are afforded the most deference, and ministerial and informal actions are afforded the least. (*Yamaha*, *supra*, 19 Cal.4th 1, 7.) The Measure, apparently, would flatten this continuum.

Nearly all statutes respecting a matter of any complexity (which is to say, most tax statutes) afford the executive branch "wiggle room" in interpreting them, within which the courts will defer to administrative agencies. The Measure would preserve the wiggle room but do away with the wiggling: under its "ratchet effect," any executive branch interpretation of tax statutes that fall under the Measure's expansive definition of "state law" must be at least as narrow as the ones before.

The executive branch could bind future Legislatures. At first, the Measure appears to preserve the Legislature's ability to ensure that statutes are interpreted as intended by making clarifying amendments, because doing so does not "result in "any taxpayer paying… a higher tax." If a taxpayer wished to argue that the "clarifying amendments" were, in fact, a tax increase in disguise, they could do so before the courts.

However, the Measure gives equal weight to tax statutes themselves and valid executive branch interpretations of those statutes. "State law," under the Measure's expansive definition, includes both

legislative acts ("state statutes") and executive ones ("state regulation," "state executive order," and "state opinion letter"), without any apparent hierarchy. (Measure, Section 4, proposed Art. XIII A § 3, subd. (h)(4).) "Any change in state law" which makes any person pay a new or higher tax requires voter approval. (*Id.*, subd. (b).) If the executive branch made "changes" to "state law," by interpreting a tax statute more narrowly than the Legislature intended, the Legislature would no longer be able to correct that errant interpretation by amending the statute.

In the example above, the Legislature would be free to make statutory changes clarifying California residency for the purpose of income tax *up until* the moment the Franchise Tax Board released its regulations, which would then serve as a ceiling on further legislative action.

Real Party asserts that "the source of an executive branch agency's authority is derived from the legislative branch." (RPI opp. 41.) However, under the Measure, this hierarchical relationship between the Legislature and the executive branch could be easily inverted—in effect, replaced by a new hierarchy where lowering taxes takes precedence over raising them.

Real Party predicates its argument that the Measure would not threaten essential government services on the presumption that if the Measure were adopted, existing state taxes would continue to be collected as usual: "TPA effects no existing state tax." (RPI opp. 48.) But this is not so. Under the Measure's "ratchet effect," executive branch agencies could whittle away at the scope of tax statutes, and the Legislature would have no recourse other than to go to the voters. Implementation of any tax statute would eventually converge towards the narrowest permissible statutory

interpretation, as the result of successive executive branch changes to "state law."

The Measure states its intention to abrogate six "hostile" court cases where the plaintiffs sought to reduce, block, or overturn tax laws, but where the courts found their arguments specious. (Measure, Subsections 2(a) and 3(e).) If the Measure became law, legally sophisticated parties, seeking to overturn or reduce taxes, might choose not to try their luck with the courts *or* the voters, instead finding more congenial forums in appeals boards and other quasi-judicial executive branch bodies. Or they might simply try to influence sympathetic executive branch staff directly.

Administrative agencies would still be unable to unilaterally declare tax provisions *unconstitutional* (Cal. Const. Art. III § 3.5), but other legal arguments (e.g. statutory construction) would be fair game. Imagine the chaos that would result if executive branch agencies were free to wield the maxim *inclusio unius est exclusio alterius* like a "magical incantation" (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 342, 351 (*CalFed*))—and those interpretations were binding on the executive branch and the Legislature.

Real Party asserts that because similar voter approval requirements have already been imposed on local governments and found permissible, they should be permissible at the state level too. (RPI opp. 10, citing *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 229 (*Amador*).), However, the statewide voter approval requirements in this Measure are easily distinguishable from the *local* voter approval requirements considered in *Amador* because the state has, and has always had, three *distinct* branches of government (Cal. Const. Art. III, § 3). Local government only has two (legislative and

executive), and they are much less distinct: local legislative bodies (e.g. city councils, county boards of supervisors) typically wield executive power as well.

If the principle against binding future governmental bodies truly is "axiomatic," as the Court of Appeal recently asserted in *Tiburon*, *supra*, 78 Cal.App.5th 700, 709, this Court might well wish to consider whether requiring voter approval to *increase* local taxes but not to *decrease* them violates that axiom.

B. The Measure Nullifies Judicial Branch Rulings that Broaden the Scope of Taxes

Compared to the other two branches, the judiciary appears relatively unscathed because the Measure's definition of "state law" would not include actions by the judiciary branch. (Measure, Section 4, proposed Art. XIII A § 3, subd. (h)(4).)

However, the Measure would present a more fundamental problem—the judiciary would be free to interpret the law, just as before, but in some cases regarding taxes, the executive branch would *no longer be able to implement the court's rulings*.

To see the difficulty, consider what would happen if Section 4 of the Measure (proposed Art. XIII A § 3) were in effect at the time a real case were tried: *Scholastic Book Clubs, Inc. v. State Bd. of Equalization* (1989) 207 Cal.App.3d 734 (*Scholastic*).

In *Scholastic*, the Court of Appeal found that there was a sufficient nexus between the plaintiff, an out-of-state bookseller, and California to permit imposition of a use tax because California teachers were tasked with selling the plaintiff's books. Prior to the case, the plaintiffs and

other sellers in a similar situation could have plausibly assumed they were exempt from California use taxes. In effect, the Court created case law which imposed taxes on a new class of taxpayers.

If the Measure were in effect, the court might still be free to make the identical decision: that the Board of Equalization had ruled correctly, and that the state could collect use tax.

The problem would arise when an executive branch official attempted to *collect* the tax. Under the Measure the plaintiff in the original case, could then sue that official, claiming that the official's actions violated the Measure's provisions. The Measure defines "state law" to include "any… state ruling… or other legal authority or interpretation… enforced… or implemented… by the legislative or executive branches." The Appeals Court's decision is a "state ruling" (even supposing it were not, it would fall under the catch-all "other legal authority or interpretation"). (Measure, Section 4, proposed Art. XIII A § 3, subd. (h)(4).) The executive branch official would be either "enforcing" or "implementing" that decision. (*Ibid.*) But this could not be, because the court's decision changed "state law" (which, even under its ordinary meaning, includes case law) in a way that would result in a class of taxpayers paying a new or higher tax, which would require legislative and voter approval. (Measure, Section 4, proposed Art. XIII A § 3, subd. (b).)

Essentially, the mistake that hapless executive branch official made under the Measure was to abide by a perfectly valid court ruling, *without waiting for the Legislature and the voters to ratify it*.

There is no part of our government plan and the rule of law more fundamental that than the requirement that the executive branch must abide by court rulings. If nullifying court rulings is not "such a far-reaching change

in our governmental framework as to amount to a qualitative constitutional revision," what is? (*Raven*, *supra*, 52 Cal.3d 336, 341.)

C. The Measure Revises the Entire Subject of Voter Involvement in Revenue Measures

The Measure seeks to make changes that, in the words of this Court, would constitute a "revision of the entire subject" of voter involvement in revenue measures. (*Wilde v. City of Dunsmuir* (2020) 9 Cal.5th 1105, 1117 (*Wilde*).) Because elections and revenue measures are both fundamental parts of our governmental framework, these changes further demonstrate the revisionary nature of the Measure. Due to drafting errors, the Measure, if it became law, it would incidentally throw the scope of the voters' referendum power into question.

Wilde is one of the six cases the Measure seeks to abrogate (Measure, Subsection 3(e)). At issue was whether changes to municipal water rates could be subject to referendum by the voters. Appellant Wilde argued that because municipal water rates were classified as "fees," not "taxes," in Articles XIII C and XIII D of the Constitution, the referendum's exception for "statutes providing for tax levies" Cal. Const. Art. II § 9, subd. a).) did not apply. Like Real Party in this case, the appellants in *Wilde* were represented by the Howard Jarvis Tax Foundation.

The Court of Appeal found that the definition of "tax" in Articles XIII C and XIII D did not apply to the referendum power because these articles did not constitute a "revision of the entire subject" of voter involvement in revenue measures (*Wilde, supra,* 9 Cal.5th 1105, 1117). This Court then laid out what *would* be necessary to constitute a "revision of the

entire subject": a clear connection between Articles XIII C and XIII D and the referendum power. (*Ibid*.)

The Measure seeks to do exactly what this Court said previous measures failed to: revise of the entire subject of voter involvement in revenue measures. It comprehensively defines all revenue measures as either a "tax" or an "exempt charge" (Measure, Section 4, Proposed Art. XIII A, § 3, subds. (c), (d), and (e) and Section 5, Proposed Art. XIII C, § 1, subds. (i) and (j).). Then it states that its definition of "tax" applies to the referendum power.

In a move reminiscent of the initiative struck down in *McFadden*, the Measure does not directly amend the referendum provision (Cal. Const. Art. II § 9, subd. (a).). Instead, it changes the provision's meaning by applying the Measure's definition of "tax" indirectly, from other articles. (Measure, Section 4, Proposed Art. XIII A, § 3, subd. (d) and Section 5, Proposed Art. XIII C, § 1, subd. (i).) ("If the proponents of the measure… had frankly recast the instrument in every detail in which it would be affected by the changes they seek… but to attain those ends by actually recasting all the affected sections… so that all the changes would fit in as integral parts of a coherent and consistent whole, then the fact of revision might be more obvious on the surface but it could be no more real in substance." *McFadden, supra,* 32 Cal.2d 330, 349.)

When is a "revision of the entire subject" in the Constitution tantamount to a qualitative constitutional revision? A revision is "a far-reaching change in our governmental framework" (*Raven, supra.* 52 Cal.3d 336.) Therefore, to be a revision, a change must necessarily affect one or more subjects which are fundamental to our government framework. However, its

effect need not even rise to the level of revising the entire subject; a "far-reaching" change is enough.

In *Raven*, this Court considered a provision which only *partially* revised a *single* subject fundamental to our government framework (the judiciary), and only with respect to its ability to independently interpret criminal defendants' rights. Nevertheless, the court found the provision "far-reaching" enough to declare it invalid as a qualitative revision (*Id.* at pp. 352-355.) Another way to view that invalid provision is that it *entirely revised* the intersection of two fundamental constitutional subjects: judicial interpretation of the Constitution, and defendants' rights.

This Court also stressed the novelty of the provision ("for the first time in California's history", *Id.* at 354), tracing state courts' ability to interpret constitutional rights independently from the federal judiciary back to the 1849 and 1879 constitutions (*Id.* at pp. 352-353.)

Under the logic of *Raven*, a "revision of the entire subject" could be a qualitative constitutional revision if it revised a subject fundamental to our government framework. An initiative constitutional amendment could conceivably revise the entire subject of "water" or "education," because these are policy areas, not parts of the governmental framework. However, entirely revising constitutional subjects like "elections," "government revenue," and "the courts" would stray outside the boundaries of a constitutional amendment.

While the fundamental nature of these latter three examples is self-evident, it might not be so for all such subjects. One might suspect an entire revision of a constitutional subject to be a revision if, like in *Raven*, the change is entirely novel, or it overturns a foundational body of case law frequently used by the courts.

In the words of *Wilde*, the Measure entirely revises the subject of "voter involvement in revenue measures." Both "voter involvement" (i.e. elections) and "revenue measures" are fundamental parts of our governmental framework. One might argue that because the Measure entirely revises the mere *intersection* of these two fundamental subjects, its scope is limited enough to qualify as an amendment. However, one could make a similar argument for the provision struck down in *Raven*.

Substantially, the Measure also revises the entire subject of "taxes" by subjecting *all tax increases* to voter approval.[3] Taxes (however defined) are a fundamental part of not just California's government framework, but the framework of any sovereign government. Furthermore, the Measure's changes would be a novelty in *any* state constitution, not just California's. (Petitioners' reply p. 21, fn. 7.)

The Measure's revision of the entire subject voter involvement in revenue measures would require the courts to discard large amounts of case law and build them anew. At the very least, the courts would have to establish when state and local governments have met the new burden of providing "clear and convincing" evidence that a revenue measure is an "exempt charge" and not a "tax." (Measure, Section 4, proposed Art. XIII A § 3 subd. (g)(1) and Section 6, proposed Art. XIII C § 2 subd. (h)(1).)

Surprisingly, the courts would *also* be obligated to rebuild our understanding of the referendum power in Article II § 9, now that the Measure yoked it, by a shared definition of "taxes," to the mandatory voter

[3] Per Petitioner's argument, the Measure may also effectively revise the entire subject of "elections" as well, by filling the ballot with minor revenue-related measures, leading to voter fatigue (Petition, p. 61).

approval requirements in Articles XIII C and XIII D. Because of drafting errors in the Measure, this would not be an easy task.

A major problem the Measure would pose for the courts is that it appears to render the "tax levies" exception to the referendum power (Cal. Const. Art. II § 9 subd. (a)) without any effect, since the Measure would already subject all tax levies to *mandatory* referenda. But constitutional language cannot be mere surplusage; the courts are obligated, in harmonizing constitutional language, to give effect to each provision. (*Bighorn, supra,* 39 Cal.4th 205, 218.) Should the courts, for example, harmonize the provisions by applying other exceptions to the initiated referendum (e.g. urgency legislation) to the Measure's mandatory referenda on tax increases?

The Measure presents a further difficulty by committing a category error: it applies its definition of "tax" (as opposed to "exempt charge") to an exception to the referendum power which reads, in full, "statutes providing for tax levies or appropriations for usual current expenses of the State," that is, statutes which have a direct impact on the budget—as opposed to an indirect fiscal impact. (Cal. Const. Art. II § 9 subd. (a).)

The referendum power is a fundamental part of California's government plan. If the Measure were to become law, the scope of the referendum power would be an open question, when it should not be.

In *Wilde*, this Court meant its description of a "revision of the entire subject" of voter involvement in revenue measures as a counterfactual, not a safe harbor for future initiative language. (*Wilde, supra,* 9 Cal.5th 1105, 1117.) The Measure's attempt to implement that hypothetical, unfortunately, appears to be revisionary in nature. Furthermore, the strange and apparently inadvertent way the Measure throws the scope of the referendum

into doubt illustrates why revisionary changes are wisely left to deliberative bodies and not to initiative drafters.

D. The Measure Guts "Home Rule" for Charter Cities

One of the crowning achievements of California's 1879 Constitutional revision was the creation of constitutionally protected "home rule" for charter cities. Voters revised the way local government was organized, replacing a mere 49 words in the 1849 Constitution (Article IV § 37) with an extensive section providing cities the means to adopt and amend their own charters (1879 Cal. Const Art. XI § 8) and related provisions (1879 Cal. Const. Art. IV § 25 and Art. XI §§ 11-14). It was clear from the beginning that the 1879 revision was made with the intention to "emancipate municipal governments from the authority and control formerly exercised over them by the Legislature." (*People v. Hoge* (1880) 55 Cal. 612, 618.)

Since then, charter cities' powers have only been strengthened and clarified.[4] Charter cities' present-day "home rule" powers stem from a constitutional *revision* adopted in June 1970 (Prop. 2, "Partial Constitutional Revision: Local Government"). Home rule for charter cities, as it exists today, constitutes California's own version of federalism: charter cities are sovereign with respect to their own municipal affairs. ("City charters… with respect to municipal affairs shall supersede all laws inconsistent therewith." Cal. Const. Art. XI § 5 subd. (a).)

State law may preempt city charters, but only when it identifies a matter of "statewide concern" and is "narrowly tailored to that purpose."

[4] A comprehensive history of the evolution of "home rule" for charter cities can be found in *Johnson v.* Bradley (1992) 4 Cal.4th 389, 394-397.

(*State Bldg. and Const. Trades Council of California, AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547 (*Vista*), 556 summarizing the four-part test in *CalFed, supra*, 54 Cal.3d 1, 16-25.) State law must *also* show clear intent to override charter cities' home rule powers specifically, not just those of local government in general. (*City of Redondo Beach v. Padilla* (2020) 46 Cal.App.5th 902, 911-918 (*Redondo Beach*).)

The Measure curtails charter cities' authority over their own municipal affairs by making sweeping and entirely novel changes to charter cities' ability to decide the contents of their own charters. These changes are so severe that they cannot be considered a mere amendment, which is "an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." (*McFadden, supra,* 32 Cal.2d 330, 333, quoting *Livermore v. Waite* (1894) 102 Cal. 113, 118-119 (*Waite*).). Furthermore, because the Measure substantially impairs *charter cities'* initiative power, the general rule that courts must "jealously guard" the initiative may not be applicable in this case.

The most fundamental power a charter city has is the power to decide what goes in its own charter. Charter cities' ability to amend or revise their own charters has always been plenary. The state Constitution has never restricted the subjects or scope of a charter revision—cities, may after all, *adopt* an entire charter by ballot measure. (Cal. Const. Art. XI § 3 subd. (a).) The single-subject rule (Article II § 8 subd. (d)) applies only to voter-initiated charter amendments, not to changes placed on the ballot by city government: "By not encumbering governing bodies of charter cities with a single subject requirement, the framers enabled charter cities to sponsor measures aimed at accomplishing comprehensive reform at the ballot box." (*Hernandez v. County of Los Angeles* (2008) 167 Cal.App.4th 12, 23.)

When the Constitution was adopted in 1879, it originally allowed the Legislature to decline to ratify certain charter amendments; this practice was abolished by the 1970 revision. However even the 1879 Constitution clearly protected the right of cities to bundle any number of subjects into one "amendment" (essentially, a revision), providing once approved by the voters, it should be "submitted to the Legislature for its approval or rejection as a whole, without power of alteration or amendment." (1879 Cal. Const Art. XI § 8.)

The only other rules which allow a pre-ballot challenge to a charter amendment or revision have nothing to do with subject matter. Proposed charter changes may not condition their effects on the percentage or distribution of affirmative votes. (Cal. Const. Art. II § 11, subds. (b) and (c), Art. XI § 7.5.) A general rule about ballot measures allows courts to remove proposed charter changes which are "wholly void and inoperative." (*Pulskamp v. Martinez* (1992) 2 Cal.App.4th 854, 861.)

The Measure would restrict how charter amendments could treat a particular subject for the first time in California's history. Furthermore, it would subject charter amendments that violate that restriction to a pre-ballot challenge (Measure, Section 6, proposed Art. XIII C § 2 subd. (f)):

> No amendment to a Charter which provides for the imposition, extension, or increase of a tax or exempt charge shall be submitted to or approved by the electors, nor shall any such amendment to a Charter hereafter submitted to or approved by the electors become effective for any purpose.

This restriction cannot be said to merely *amend* charter cities' powers because it is an entirely novel change that does not "better carry out the purpose" for which home rule was framed. (*Waite*, *supra*, pp. 118-119.) It

is also not narrowly tailored to the Measure's stated purpose. The Measure would entangle seemingly unrelated charter amendments through its exceedingly broad definitions of "imposition," "extension," and "tax." (Measure, Section 5, proposed Art. XIII C § 1.) For example, any charge or a government service is either a "tax" or an "exempt charge." (*Id.*, subd. (i).) Surprisingly, one of the meanings of "impose," as defined in the Measure, is "create." (*Id.*, subds. (c) and (i).) Thus, under the Measure, any charter amendment that mentioned a new government service for a fee could be invalidated because it would "impose" (that is, *create*) a tax or exempt charge by implication. Because charter amendments would be subject to pre-ballot changes, provisions of those amendments that did not offend the Measure's subject-matter restriction would not be severable.

Real Party has expressed indignation at the way Petitioners subjected the Measure to a pre-ballot challenge: "What is surprising are the lengths that ***this*** government will go to suppress and punish the exercise of the constitutional right of the People…" (RPI opp. at 16, emphasis his.) Imagine how Real Party might have reacted if the Measure had instead been challenged on the basis that *one* of its provisions touched on a certain expansively defined subject connected to disparate aspects of government. But that is precisely what the Measure seeks to do to future voter-initiated city charter amendments!

The city, or initiative drafters, could instead place tax and exempt charge provisions into municipal ordinances instead. But this would be another novel insult to charter cities' powers; charter cities have always had the power to organize their own law as they see fit. Furthermore, charter cities' home rule powers ultimately stem from provisions in their charters,

not their municipal ordinances: "it shall be competent in any city charter…" (Cal. Const. Art. XI § 5, subd. (a).)

It would also not be enough because municipal ordinances cannot override the city charter. Like the Measure's statewide provisions, the Measure creates a "ratchet" effect by *allowing* charter amendments that decrease or limit the scope of taxes and exempt charges, which means that some provisions, once amended into the charter, could not be amended out.

For example, suppose a charter city adopted an initiative charter amendment containing the provision "Our municipal swim center shall admit children under the age of 12 for free," in effect, exempting a class of payer from a city charge. However, if that city, finding their swim center overrun by children from neighboring cities, wished to amend that provision to read "Our municipal swim center shall admit children *resident in our city* under the age of 12 for free," it could not, as that would "extend" the swim center charge to a new class of taxpayer: nonresident children under the age of 12. (Measure, Section 5, proposed Art. XIII C § 1, subd. (b).) The provision would be locked into the charter until that part of the charter was revised (which cannot be done by initiative) or the *entire* charter was revoked. By adopting the original "children swim free" charter provision, city voters would bind their own hands, violating a fundamental rule of California's government framework. ("Through exercise of the initiative power the people *may* bind future legislative bodies **other than the people themselves**." *Rossi, supra,* (1995) 9 Cal.4th 688, 715-716, emphasis added.)

In sum, evidence for the revisionary nature of the Measure's sweeping changes to charter cities' home rule is overwhelming.

However, before considering whether the Measure constitutes a revision, this Court needs to decide the standard of proof for the Measure's

revisionary nature. Should the Court "jealously guard" the statewide initiative by granting the Measure a presumption of validity in this pre-ballot challenge, or should it simply decide which side makes the most cogent argument?

This is not an easy question because the courts have a duty to "jealously guard" the charter city initiative as well. The Measure, if it because law, would significantly impair charter cities' initiative power. As discussed above, it would ruin the charter amendment process, which is the most powerful way charter city initiatives can be used. It would also impose a higher vote threshold on some charter city initiatives, a first for constitutional amendments.

One of the six cases the Measure seeks to abrogate is *Cal. Cannabis Coalition v. City of Upland* (2016) 3 Cal.5th 924 (*Upland*). It does so by explicitly specifying that local initiatives which raise taxes must be approved by two-thirds of the voters. (Measure, Section 6, proposed Art. XIII C § 2, subd. (b).) There has only ever been one provision of the Constitution which imposes a higher voter threshold on charter city initiatives: Article XVI § 18, respecting bonded indebtedness. But that provision was not created by constitutional amendment; it stems from the from the *same article* of the same constitutional revision that created home rule for charter cities in the first place. (1879 Cal. Const. Art. XI § 18.)

Under the 1970 revision to charter city powers, setting the vote threshold for city initiatives is the purview of charter cities themselves. State law determines the procedures for local initiatives, *except* for charter city initiatives. (Cal. Const. Art. II § 11 (a).) Specifically, while the Constitution specifies the vote threshold for state initiatives: "by a majority of votes" (Cal. Const. Art. II § 10), it does not do so for local initiatives. That threshold is

found in state statute: "if a majority of the voters voting on a proposed ordinance vote in its favor…" (Elections Code § 9217.) The power to set a different vote threshold for city initiatives is left to charter cities themselves, under their core power to "conduct city elections" (Cal. Const. Art. XI § 5, subd. (b)(3).)

Real Party invokes this Court's duty to "jealously guard" the statewide initiative by allowing the Measure to continue to the ballot (RPI opp. 16), presumably referencing *Amador*. However, in talking about this duty, *Amador* itself cites only one case, respecting not the statewide initiative, but the *local* initiative in the city of Livermore. (*Amador*, *supra*, 22 Cal.3d 208, 248, referencing citing *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.) The duty to "jealously guard" the initiative clearly applies both to statewide and local initiatives, including charter city initiatives.

How can this Court simultaneously "jealously guard" both the Measure, as an exercise of the statewide initiative, and charter cities' initiative systems, which the measure seeks to stifle? A good parent ought to protect both of their children equally, but only a terrible one would "jealously guard" one child's right to strangle the other. Because the Measure so significantly impairs charter cities' initiative powers, the Court cannot feasibly fulfill its duty to "jealously guard" the initiative as it normally would in a pre-ballot challenge and should not grant this Measure the presumption of validity.

However, this analysis does not go far enough because it presumes the statewide initiative and charter cities' initiatives are co-equal. They are not. While the statewide initiative was created by a constitutional *amendment* in 1911, charter cities' initiative power stems directly from home

rule granted by the 1879 constitutional *revision*. (See e.g. *In re Pfahler* (1906) 150 Cal. 71, upholding the City of Los Angeles' initiative system, adopted in 1903. Charter cities across the state adopting the initiative is what paved the way for the 1911 amendment which spread the initiative system statewide. San Francisco and Vallejo were among the first in the nation to adopt the initiative in 1898. By 1910 twenty charter cities in California had adopted the initiative, the referendum or both. (Tracy M. Morgan, Public Policy Institute of California, "The Local Initiative in California", 2004, https://www.ppic.org/wp-content/uploads/content/pubs/report/R_904TGR.pdf at p. 8).

Thus, the analogy of a child strangling their sibling is not quite apt; the Measure's effect on charter city initiatives is more like a child attempting to strangle their own mother. If the Measure became law, it would, in essence, set fire to the laboratories of democracy that made the statewide initiative, and thus, the Measure, possible.

II. The Measure is Invalid Because it Violates the Single-Subject Rule

A. The Measure's Ban on Redistribution of Property Taxes Constitutes a Separate Subject

Even supposing the Measure were not already invalid for attempting to revise the Constitution, it should still be removed from the ballot for violating the single-subject rule.

An initiative measure may not embrace more than one subject. (Cal. Const. Art. II § 8, subd. (d).) This Court has held that for an initiative to meet the single subject requirement, all its parts must be reasonably

germane to each other *and* to the general purpose or object of the initiative. (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 245.)

The Measure has a clearly articulated purpose. However, Section 8 of the Measure (proposed Art. XIII, §§ 8 and 14) falls outside of this purpose, constituting a separate subject. While every other change in the Measure pertains to controlling taxpayer costs, Section 8 embraces a completely different subject, providing that the proceeds from property taxes may not be redistributed outside of the counties where they are collected.[5]

The purpose of the Measure, according to its Statement of Purpose (Section 3), is to make it difficult for state and local governments to impose any new or higher tax, fee, or other government charge, while leaving intact the government's powers to lower or reduce the scope of such charges. To reach these ends, the Measure employs two tools: voter approval of tax changes (Subsections 3(a) and 3(e)) and greater transparency (Subsections 3(b) and 3(c)). With this greater control and transparency, the Measure asserts, members of the public would have greater ability to control costs, balancing increased taxes and other charges against increases in the cost of living (Subsection 3(d)).

Except for Section 8, every proposed change under the Measure limits new or higher taxes, and uses voter approval, transparency, or both to achieve these ends.

Section 8 is different in kind. It does not make it harder for governments to raise taxes or other charges, nor does it make it easier for

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[5] A similar provision (California Const. Art. XIII A § 1, subd. (a).) already bans extra-county redistribution of most, but not all, ad valorem property taxes. It does not restrict redistribution of other property taxes, such as parcel taxes.

governments to lower them. It does not require voter approval—for example, it would not have been out of character for the Measure to require a vote of a county's electors to participate in any tax-sharing scheme which redistributed property tax revenue outside the county[6]. Additionally, this section fails to make the redistribution or appropriation of county taxes any more transparent.

Section 8 *is* alluded to in the Measure's Statement of Purpose, but only in a way that shows the section does in fact constitute a separate and unrelated subject (Measure, Subsection 3(d), emphasis added.):

> Furthermore, the purpose and intent of the voters in enacting this measure is also to ensure that taxpayers have the right and ability to effectively balance new or increased taxes and other charges with the rapidly increasing costs Californians are already paying..., **and** to further protect the existing constitutional limit on property taxes and ensure that the revenue from such taxes remains local...

Real Party, in his three-and-a-half-page summary of the Measure (RPI Opp. at pp. 17-20), omits any explanation of how Section 8 relates to the rest of the Measure. Instead, he merely notes that Section 8 amends two sections of the Constitution "relating to property taxes and charges", further suggesting that Section 8 is not really part of the Measure's overall plan. Section 8 appears to be primarily "related" to the others by being on the drafters' wish list when the Measure was drafted, much like the list of court cases the Measure seeks to abrogate. (Measure, Subsection 3(e).)

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[6] See, for example, Cal. Const. Art. XIII § 29 for such a provision respecting the redistribution of sales taxes.

Is Section 8's relation to "taxes and charges" sufficient to make it "reasonably germane" (*Brosnahan v. Brown, supra,* 32 Cal.3d 236, 245) to the rest of the Measure? Previous rulings by this Court show it is not.

The case on point is *California Trial Lawyers Association v. Eu* (1988) 200 Cal.App.3d 351 (*CTLA*), confirmed by this Court in *Senate of the State v. Jones* (1999) 21 Cal.4th 1142, 1158 (*Jones*). *CTLA* concerns a pre-election challenge against a lengthy measure, nearly all of whose provisions were related to the subject of controlling the cost of insurance. However, one provision, which the Court of Appeal noted was "located inconspicuously" in the middle of the measure, instead added a section to the Insurance Code which provided insurance companies protection from future campaign contribution regulations. (*Id.* at 356.)

Proponents of the insurance measure ("Association"), referencing several cases which construe the single-subject rule liberally, argued that the initiative dealt *generally* with insurance industry practices. (*Id.* at 359.) Because the "inconspicuous" section at issue related to a specific aspect of insurance industry practices, the Association argued the section *was* reasonably germane to the subject of their measure. (*Ibid.)*

The Court of Appeal was unconvinced (*Id.* at 360):

> We cannot accept the implied premise of Association's analysis, i.e., that any two provisions, no matter how functionally unrelated, nevertheless comply with the constitution's single-subject requirement so long as they have in common an effect on any aspect of the business of insurance. Contemporary society is structured in such a way that the need for and provision of insurance against hazards and losses pervades virtually every aspect of life. Association's approach would permit the joining of enactments so disparate as to render the constitutional single-subject limitation nugatory.

If insurance is too disparate a subject to serve as the single subject of an initiative, how much less disparate is the subject of "taxes and charges"? Just like the Association's measure in *CTLA*, all proposed constitutional changes in Real Party's measure *except those in Section 8* relate to controlling costs borne by the public, not a larger, more general subject. It is hard to see under what rule the Court could find permissible the joining of Section 8 with the cost-control provisions in the rest of the Measure, without similarly rendering the single-subject limitation nugatory.

Additionally, much like the contested provision in *CTLA*, Section 8 is situated inconspicuously within the Measure. Section 8 is positioned last among the Measure's other sections enacting constitutional changes, despite the general sorting scheme of the Measure (by Article, then Section of the Constitution), suggesting that Section 8 should appear *first*. Insofar as Section 8 is mentioned in the Measure's Statement of Purpose, it is joined to the end of an otherwise unrelated subsection pertaining to controlling costs (Measure, Subsection 3(d).)

While the changes proposed in Section 8 may be of great importance to its drafters, they do not fall within the general purpose of the Measure, nor are they reasonably germane to any shared single subject, other than one so disparate as to be meaningless: "taxes and charges."

Rather than burying Section 8 within the Measure currently before the Court, Real Party should have circulated it as a separate initiative, giving voters the option to approve both, one, or none of these distinct proposals. (*Jones, supra*, 21 Cal.4th 1142, 1158.)

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Dated: January 28, 2023

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